No. 91

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

CHARLES R. FISCHER, Commissioner of Insurance of the State of Iowa, as Receiver for the American Life Insurance Company,
Petitioner,

vs.

AMERICAN UNITED LIFE INSURANCE COMPANY, JOHN G. EMERY, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan, and DAN E. LYDICK, Receiver of the American Life Insurance Company of Detroit, Michigan,
Respondents.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT JOHN G. EMERY, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, AS PERMANENT LIQUIDATING RECEIVER OF THE AMERICAN LIFE INSURANCE COMPANY OF DETROIT, MICHIGAN

CLAYTON F. JENNINGS,
EDMUND C. SHIELDS,
Counsel for Respondent John G. Emery, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan.
Business Address:
1400 Olds Tower,
Lansing, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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STATEMENT OF CASE

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

The many errors and omissions in the petitioner's Statement of the Case require a supplemental statement by this respondent for a proper understanding of the issues involved.

The American Life Insurance Company of Detroit, Michigan, hereinafter referred to as the Michigan Company, was formerly known as the Northern Assurance Company of Michigan. It changed its name to American Life Insurance Company by amendment to its articles of association in 1921 (191-192).

The subject matter of the controversy is the right to possession for administration of securities on deposit with the Insurance Commissioner of the State of Iowa on April 12, 1938, the date of the inception of the liquidation proceedings in the Michigan State Court, in the face amount of $3,600,000.00. The record does not suport petitioner's statement that the controversy concerns the enforcement of a lien against those securities for the benefit of policyholders originating in the American Life Insurance Company of Des Moines, Iowa, hereinafter referred to as the Iowa Company, nor that the deposit was made pursuant to the statutes of the State of Iowa. Such statements are denied by the respondents. There should be no dispute as to the facts since in a large measure all the essential facts were stipulated (191-202).

As of July 30, 1921 the Michigan Company reinsured all the life insurance business of the Iowa Company (192). On August 24, 1921 the reinsurance agreement was executed by the respective companies. The contract was approved by the Commission of the State of Iowa on August 27, 1921, and by the Insurance Commissioner of the State of Michigan on September 1, 1921 (Exhibit A, 203-208).

At that time the Michigan Company had not been admitted to do business in many of the states in which the Iowa Company was authorized to do business. For that reason the corporate existence of the Iowa Company was continued and policies for insurance written by agents in those states in which the Michigan Company was not authorized, and policies issued on the form, Exhibit G, instead of the form previously used by it, Exhibit F (391). The policy form, Exhibit G, did not contain the recital and provisions referred to in petitioner's Statement of the Case on page 3 of his brief.

Supplemental contracts were entered into between the companies on December 27, 1922 and October 24, 1923 (Exhibits B and C, 208-218) so as to fully cover the reinsured business in those states in which the Michigan Company had not been previously qualified. After the contract, Exhibit C, was executed and approved, the Iowa Company was dissolved and ceased to exist. It was not insolvent, and no receiver was appointed at any time to take over its assets (390-391). The Iowa Company transferred to the Michigan Company all of its assets except a sufficient amount in value of cash, bonds and mortgages to equal the capital and admitted surplus of the Iowa Company as shown by its statement of condition on July 30, 1921, as computed and determined by the Insurance Departments of the States of Iowa and Michigan (206). These assets equalling the capital and surplus of the company were distributed among its stockholders.

On page 4 of petitioner's brief, and again on page 42, he sets forth Paragraphs 5 and 6 of Exhibits A, B and C, but before the commencement of Paragraph 5 he sets out a portion of a sentence taken from another part of the contracts in such form as to indicate that that sentence immediately precedes Paragraph 5 and refers to Paragraph 5. A reference to the contracts, Pages 205, 210 and 216 discloses the misleading nature of the excerpts from the contracts as set forth by petitioner. The excerpt set forth immediately ahead of Paragraph 5 in petitioner's brief has no reference whatsoever to Paragraphs 5 and 6. It is found in Paragraph 1, and reads as follows:

> "* * * the said American Life Insurance Company, Detroit, Michigan, does hereby, upon approval of such contract, assume and agree to pay all valid, legal outstanding contractual liabilities of said American Life Insurance Company, of Des Moines, Iowa, now accrued or hereafter to accrue, arising from policy contracts or otherwise, except liability to its stockholders, and covenants and agrees to and with the said American Life Insurance Company, of Des Moines, Iowa, and to and with each of the holders of the policies and contracts herein referred to, and to and with the bene-

> ficiaries thereof, and their legal representatives and assigns, and each and every of them, to assume and carry out the several obligations of the American Life Insurance Company, of Des Moines, Iowa, contained in the policies and contracts herein referred to, and covenants and agrees to forthwith issue to each holder of such policies and contracts of life insurance, endowments and annuities, its independent certificate of assumption as of September 30th, 1923, to be attached to each such policy or contract, reinsuring the same according to and subject to the terms and conditions thereof; * * *"

The mistatement is serious since an accurate statement of the Contract controls the issues.

The Statutes of Iowa now and then (*Sections 8654* and *8655, Iowa, 1931, Insurance Laws*, 218-220) required the deposit *by domestic life corporations* of securities complying with *Section 8737* as to the nature of the securities in an amount equal to the cash value of the policies then in force upon the basis of the American and/or Actuaries and Combined Experience Tables of Mortality.

In compliance with the statutory requirement the Iowa Company had on deposit with the Insurance Commissioner of the State of Iowa as of August 24, 1921, $2,930,840.71; as of December 27, 1922, securities of the face value of $3,241,420.00; and as of October 24, 1923, securities of the face value of $3,397,205.00 (192), the deposits being equal to the reserves on all policies in force in the Iowa Company on the respective dates of the contracts, Exhibits A, B and C. The Iowa Company had fully complied with the Iowa statute at the time it reinsured its insurance business with the Michigan Company in 1921.

There was, however, no Iowa statute then or now requiring a similar deposit by foreign life corporations. The statute in reference to foreign insurance companies reads as follows:

> "8652 — *Foreign companies — capital or surplus-investments.* No company incorporated by or organized under the laws of any other state or govern-

ment shall transact business in this state unless it is possessed of the actual amount of capital required of any company organized by the laws of this state, * * * and the same is invested in bonds of the United States or of this state, or in interest-paying bonds, when they are at or above par, of the state in which the company is located, or of some other state, or in notes or bonds secured by mortgages on unincumbered real estate within this or the state where such company is located, * * * which securities shall at the time, be on deposit with the superintendent of insurance, auditor, comptroller, or chief financial officer of the state by whose laws the company is incorporated, or of some other state, and the commissioner of insurance is furnished with a certificate of such officer, under his official seal, *that he as such officer holds in trust and on deposit for the benefit of all the policyholders of such company*, the securities above mentioned. This certificate shall embrace the items of security so held, *and show that such officer is satisfied that such securities are worth one hundred thousand dollars* * * *." (Italics supplied).

By this section of the Iowa statute such foreign corporations are required to possess an actual amount of capital equal to that required of any domestic company, which capital must be invested as required by the section, and at the time be on deposit with the proper official of the state by whose law the company is incorporated, and the Iowa Commissioner must be furnished with a certificate that such deposit is for the benefit *of all of the policyholders of the company* (225-226). No other Iowa statute applies to the deposits of foreign life insurance companies.

Michigan has a very comprehensive Insurance Code, which is *Act 256, Public Acts of Michigan, 1917*, but herein we refer to the pertinent portions of the Code as found in Compiled Laws of Michigan, 1929. Under Sections 12390-12391, Compiled Laws of Michigan, 1929, which appear as Sections 9326 and 9331, Compiled Laws of Michigan, 1915, (Exhibit H), the pertinent portions read as follows (279-282):

"Sec. 4. The capital of any stock company organized under this act shall not be less than one hundred thousand dollars * * *; and no such stock company * * * shall be authorized to issue policies or assume any risk whatever until they have deposited with the state treasurer, as security for any liability to insured parties, stocks or bonds of the United States or of any state or territory of the United States, or of any city, county, village, township or school district of this state authorized by act of legislature to issue the same, or first mortgage bonds of corporations organized under the laws of the state of Michigan, to the amount in par value, exclusive of interest, of not less than one hundred thousand dollars, which stocks or bonds shall be retained by the state treasurer, and disposed of as hereinafter directed: * * * Provided further, That personal obligations secured by first mortgage on improved and productive real estate within this state, worth at least double the amount of the lien and bearing interest of not less than five per cent per annum, may be received by the state treasurer instead of the bonds or stock hereinbefore provided for in this section. * * *

"Sec. 9. The bonds, or stocks and mortgage securities deposited by any such company with the state treasurer, shall be held by him as security for policyholders in such company; * * *."

and Section 12377, Compiled Laws of Michigan, 1929, reads as follows:

"Sec. 18. Whenever any fire or life insurance company, organized under the laws of this state and desiring to be admitted to do business in any state of the United States or in any foreign country, shall be required to make or maintain a deposit of cash or securities or both in some state for the benefit of its policyholders other than or in addition to the deposit required to be made with the state treasurer under the law of its incorporation, such other or additional deposit may be made and maintained with the state treas-

urer of this state. *Such deposits so made shall be held by the state treasurer as security for the policy-holders of the company making the deposit* and shall be subject so far as applicable to all the provisions of law governing deposits with the state treasurer by legal reserve life insurance companies organized under the laws of this state."

In 1921 the Michigan Company was required to have on deposit with the Treasurer of the State of Michigan securities of the face value of $100,000.00. At a later date this statute by amendment required a $200,000.00 deposit. The Michigan Company at all times complied with these requirements. It is not difficult to find the reason that the Iowa Commission required a deposit in the State of Iowa in excess of three million dollars in the reinsurance treaties between the Michigan and Iowa Companies in view of the fact that under the Michigan law as it then existed and the Iowa law referring to the admission of foreign insurance corporations, the Michigan Company was only required by statute to have a deposit solely for the benefit of policyholders in the amount of $100,000.00. Paragraphs 5 and 6 of Exhibits A, B and C set up a deposit in the State of Iowa by the Michigan Company as a matter of contract. The Michigan statute as set forth above requires that deposits of life insurance companies in the State of Michigan or in any state of the United States or in any foreign country shall be held as security for the policyholders of the company making the deposit.

Pursuant to the contracts, Exhibits A, B and C, the Michigan Company issued to all policyholders of the Iowa Company a certificate of assumption of liability (Exhibit E, 227).

As provided in the contracts, securities were withdrawn from the deposit with the Iowa Insurance Commissioner by the Michigan Company and securities of the same kind and character deposited in lieu thereof, but at all times the face amount of the deposit was in an amount equal to the legal reserves upon the policies of insurance which originated in the Iowa Company as required by the contracts (193-194). The withdrawal and sub-

stitution of securities by the Michigan Company was continued to April 12, 1938 when insolvency proceedings were instituted against the Michigan Company by the Insurance Commissioner of the State of Michigan. On that date all securities, except five items of the face value of approximately $30,000.00, were substituted securities and were not a part of the deposit at the time of the execution of the contracts (194). The Michigan Company collected all income from the securities and handled all administrative matters connected with the securities. There were no written assignments of the securities, so only the bare physical possession was in the Iowa Insurance Commissioner (194).

From 1921 to 1938 the Michigan Company operated in various states of the Union, including Iowa and Michigan. Pursuant to the statutes of the several states annual reports showing the financial condition of the company were filed with the insurance commissioners (195). The Michigan Company filed such reports with the Iowa Insurance Commissioner as of December 31, 1921 to as of December 31, 1937. Except for the report of December 31, 1937 at no time did the reports disclose that a part of its assets were deposited in the State of Iowa for the exclusive protection of policies originating in the Iowa Company, but rather the reports stated to the contrary. Under the heading, "Special Deposit Schedule", was written the word, "None", on each of these reports except the one as of December 31, 1937. As to that statement at the examination of the company which found it insolvent, upon the insistence of the Iowa examiners a statement was made that there were deposits for the benefit exclusively of the policyholders originating in the Iowa Company. No license to do business was issued upon this report in any state (195, 245-277). The Michigan Company maintained these deposits not as a matter of statute, but as a matter of contract, and did not question its contractual obligation.

The delay between the institution of the insolvency proceedings on April 12, 1938 and the appointment of a permanent receiver on September 16, 1939 was occasioned by extended litigation, which resulted in an appeal taken to

the Supreme Court of Michigan, which was decided by the Supreme Court of Michigan on September 5, 1939. (*Gauss vs. American Life Insurance Company*, 290 Mich. 33, 287 N. W. 368). In the meantime the assets of the company were being administered by the Insurance Commissioner of the State of Michigan as Temporary Receiver.

Under the Michigan statutes the Insurance Commissioner as statutory receiver of an insolvent life insurance company takes title to all assets of the company wherever located. The statute reads as follows:

> "12266. *Liquidation; order, filing, contents; powers of commissioner.* Sec. 4. If, on like application and order to show cause, and after a full hearing, the court shall order a liquidation of the business of such corporation, such liquidation shall be made by and under the direction of the commissioner of insurance who may deal with the property and business of such corporation in his own name as commissioner or in the name of the corporation, as the court may direct, and shall be vested by operation of law with title to all the property, contracts and rights of action of such corporation as of the date of the order so directing him to liquidate. The filing or recording of such order in any record office of the state, shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such corporation would have imparted. * * *".

The Michigan receiver as domiciliary receiver became vested with title to all assets, wherever located, of the Michigan Company as of April 12, 1938 (286). The Michigan Receiver retained possession of the cards, books and records relating to the policies originating in the Iowa Company and collected the premiums thereon until November 17, 1939 (201). On November 17, 1939 in appropriate proceedings the Michigan receiver entered into a written agreement with the American United Life Insurance Company, hereinafter referred to as the American United, for the reinsurance of all the business of the Michigan Company. The American United issued a certificate of assumption for all outstanding insurance policies of the

Michigan Company (Exhibit P). It took possession of all books, records and files of the Michigan Company, including those pertaining to the policies originating in the Iowa Company, and has since November 17, 1939 been collecting premiums on all outstanding policies. It has taken possession of all assets of the Michigan Company, excepting those in the Iowa deposit held by petitioner (198-9).

On November 17, 1939 there were 4,313 policyholders who originated with the Iowa Company, representing insurance in force in the amount of $6,657,364.82. These policyholders were distributed among 41 different states of the Union, as well as Canada, Philippine Islands, Hawaii, Porto Rico, and South America. Of these policyholders 1,535 were residents of the State of Iowa representing insurance in force in the amount of $2,456,039.00, or 36.89% of the group (198, 199, 341, 384). Also resident in Iowa are 1,707 policyholders who originated in the Michigan Company, representing $2,315,543.70 insurance in force, which under the theory of the petitioner's case are not protected by the Iowa deposit (384).

Upon notice of the reinsurance agreement given them by the Michigan receiver and receipt of the assumption certificate from the American United, only 81 policyholders originating in the Iowa Company dissented (199). All the rest, by their silence and by receiving and retaining the assumption certificate, and by payment of premiums, have definitely accepted the reinsurance agreement and look now to the American United for the fulfillment of their policy contracts. The 81 policyholders who dissented filed claims for the value of their policies with the Michigan receiver for submission to the Circuit Court for the County of Ingham, in Chancery, Michigan (199).

It is the claim of petitioner that notwithstanding the provisions of the Michigan law, he has the sole and exclusive right to administer the assets in the Iowa deposit; that on April 12, 1938 title to them vested in him as Insurance Commissioner of the State of Iowa; that he holds them for the sole and exclusive benefit of those policyholders who originated in the Iowa Company, and whose

policies were in force on April 12, 1938; that the assets in the Iowa deposit and the policyholders originating in the Iowa Company, regardless of the election they have made, should be separated from all others and from the domiciliary receivership; that those assets should be liquidated and the policyholders originating in the Iowa Company treated by a separate and distinct receivership in the Iowa State Courts. It is upon this claim that issue was framed. Pleas to the jurisdiction (12, 16, 24) were overruled and exceptions properly preserved (28). Pursuant to Rule 12 the respondents answered (143, 148, 163). The cause was heard upon its merits commencing June 3, 1940. The District Court granted the relief petitioner prayed for, but the decree entered pursuant to his decision was reversed by the Circuit Court of Appeals for the Eighth Circuit, which held that the Federal Court had no jurisdiction over the subject matter (*172 Fed. (2d) 811*).

SUMMARY OF RESPONDENT'S ARGUMENT

I.

The Michigan statutory law vests title to all assets of a Michigan life insurance company in the Commissioner of Insurance as statutory receiver of such a company when it becomes insolvent.

II.

The laws of the State of Michigan become a part of the charter of a domestic life insurance company.

III.

The administration of the assets of a domestic life insurance company rests solely in the domiciliary receiver.

IV.

The reinsurance treaties between the Iowa Company and the Michigan Company created a novation.

ARGUMENT

The Administration of Any Part of the Estate of an Insolvent Life Insurance Company is not Subject to the Jurisdiction of any Court other than the Court Appointing the Domiciliary Receiver

The Circuit Court of appeals held that the Federal Courts in Iowa did not have jurisdiction over the subject matter of the cause for the reason that such jurisdiction rested exclusively in the State Court in Michigan in which the insolvency proceedings were instituted and which appointed the Insurance Commissioner of the State of Michigan as statutory receiver, that is to say, the Circuit Court for the County of Ingham, Michigan, in Chancery.

The argument naturally falls into four parts as set forth in the Summary of Respondent's Argument.

The respondents American United Life Insurance Company and Dan E. Lydick, Texas Receiver, are filing separate briefs. To avoid repetition, the respondent John G. Emery, Commissioner of Insurance of the State of Michigan, as Permanent Liqudating Receiver of the American Life Insurance Company, adopts their arguments.

I.

Under Michigan Law Title to All Assets in the Michigan Receiver

Under the statutes of Michigan, as has been pointed out in the Statement of the Case, the respondent, John G. Emery, as domiciliary receiver of the American Life Insurance Company, is the holder of absolute title of all assets of the American Life Insurance Company, wherever situated, regardless of state lines, and, therefore, the deposit in the State of Iowa, which is at issue in this cause, is included in the assets to which he holds title. The respondent, American United Life Insurance Company, has an interest in the deposit by virtue of its contract of re-

insurance entered into with the respondent, John G. Emery, domiciliary receiver.

The Michigan statute is not unusual and is to be found in the insurance laws of many of the States. The similar statutes of other states have been construed many times by the Supreme Court of the United States and by various Federal and State courts.

There was probably more litigation concerning the general proposition stated above growing out of the receivership of the *Life Association of America* than any other life insurance company receivership. The company became insolvent and was placed in the hands of the Superintendent of Insurance of the State of Missouri as statutory receiver on November 10, 1879. We shall discuss and rely upon many of the cases that are reported in that receivership. It, therefore, seems advisable at the outset to state the facts concerning that receivership and the nature of the company which was involved before ing up the specific cases upon which we rely.

The Life Association of America was organized under the laws of the State of Missouri, with its principal place of business at St. Louis, and did business in that and in other states of the Union. The constitution of this insurance corporation provided that the board of directors could by resolution organize branches of the Association at different points throughout the State of Missouri and the United States, the business of each branch to be placed under the supervision of its own board of resident trustees. The board of directors had the power to organize such branches under and in accordance with the provisions of the laws of any state or territory of the United States, and, when organized, such board of directors might enter into agreements and make contracts with the trustees or directors of said branches for the extension and management of the business of the Association as they might deem proper, and that all such contracts should be binding upon the Association and all of its branches. It was also provided that it was the duty of the board of directors to loan the funds of the Association as far as practicable upon the security of unincumbered real estate situated within the district from which funds were derived,

thereby conferring upon each section the benefit of a local organization. It was further provided that a full reserve (or reinsurance fund), based upon the assumptions mentioned in section 5 of article 18 of the constitution, should at all times be kept up as to each branch, and that no dividends shall be declared or division of surplus made which would impair this reserve. Article 5 provided that the net assets of the business of a given branch should be invested and kept invested within the state in which the branch was located, provided that proper securities as provided by the constitution could be obtained in that state. The amount invested was the whole of the premiums collected by that branch less the amount necessary to be held at the home office as a contingent fund to pay the expenses and losses from year to year as the same became due and payable. Much of the litigation in the various states grew out of the fact that the assets of the insurance corporation located in various states arose from the premiums paid by policyholders in the branch department of that particular state. In most of the cases it was claimed that the net assets of the business of the branch located in a state other than the domiciliary state of the insurance corporation was required to be kept invested in that state as a special and continuing security for the benefit of the policyholders of the branch of the particular state, and that such assets constituted a trust fund charged with the payment of the policyholders of the state in question to the exclusion of other creditors and policyholders. So it is to be seen that a situation existed in each of the states in which the Life Association of America was doing business outside of Missouri entirely analogous to the situation in the case at bar, and that the claims of the policyholders in these other states are analogous to the claim being made now by the Insurance Commissioner of the State of Iowa as the Iowa receiver.

One of the earliest cases, and perhaps the leading case by virtue of the many times it has been cited and quoted and followed in later cases, arises out of the situation set forth above. It is the case of *Relf v. Rundle*, 103 U. S. 222, 26 L. Ed. 337. Relf was the Superintendent of Insurance of the State of Missouri and became the statutory receiver of the Life Association of America. Under the

statutes of the State of Missouri, as in Michigan, upon the appointment of a receiver for a domestic insurance company, title to all the assets of the insolvent corporation vested in the receiver for the use and benefit of the creditors and policyholders of such corporation and such other persons as might be interested in such assets. Rundle, a policyholder in the State of Louisiana commenced a suit against the Life Association, the object of which was to have the assets of the company in Louisiana declared a trust fund and applied to the payment of the claims of Louisiana creditors and policyholders in preference to others. Relf, the domiciliary receiver, intervened. John R. Fell of New Orleans was appointed the Louisiana receiver. This Court pointed out that the entire controversy was between Rundle, representing the Louisiana creditors and policyholders on one side, and Relf, the domiciliary receiver, as representative of the corporation and its property on the other side, as to the respective rights of the parties in the Louisiana assets. Mr. Chief Justice Waite, speaking for this Court, said:

> "Fell has in his possession, as a naked trustee, some of the Louisiana assets, * * *. After the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost (temporary receiver) was ended when the property of the Corporation was transferred to Relf and he became under the law entitled to the possession. * * * He was the statutory successor of the Corporation for the purpose of winding up its affairs. As such he represents the Corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way

dissolved and put out of existence. He was, in fact, the Corporation itself for all the purposes of winding up its affairs."

This Court held, as has been pointed out in numerous cases since that time following the above case, that he had paramount title to the property of the Association in the State of Louisiana.

While it is true, as pointed out by petitioner, that *Relf v. Rundle, supra,* really turned on the question of the right of removal to the Federal Court, it did set forth principles which are controlling in the case at bar and which have become the law of the Nation because of the numerous times that those principles have been reiterated in subsequent cases wherein it can not be claimed that the setting forth of those principles are *obiter dictum.*

Some of the cases following the case of *Relf v. Rundle,* supra, are as follows:

Bolen-Darnell Coal Co. v. Kirk, 25 Okl. 279, 26 L.R.A. (N.S.) 270;
Chesapeake etc. Ry. Co. v. McCabe, 213 U.S. 218, 53 L. Ed. 770;
Rundle v. Life Assn., 10 Fed. 720;
Baltimore etc. R. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643;
Augusta v. Kimball, 91 Me. 608, 41 L.R.A. 477;
Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1176;
Fish v. Smith, 73 Conn. 281, 47 Atl. 713;
Barley v. Gittings, 15 App. D. C. 438;
MacMurray v. Sidwell, 155 Ind. 566, 58 N. E. 725;
Joy v. Midland State Bank, 26 S. D. 254, 128 N. W. 151;
Hardee v. Wilson, 129 Tenn. 513, 167 S. W. 475;
Avery v. Boston Safe Deposit etc. Co., 72 Fed. 701;
Hale v. Hardon, 95 Fed. 747;
American Water-Works Co. v. Farmers' Loan etc. Co., 20 Colo. 211, 25 L.R.A. 341;
Gilman v. Ketcham, 84 Wis. 69, 23 L.R.A. 58;

Life Assn. of America v. Goode, 71 Tex. 95, 8 S. W. 639;
Childs v. Cleaves, 95 Me. 514, 50 Atl. 719;
Nashua Savings Bank v. Anglo-American Land etc. Co., 189 U. S. 221, 47 L. Ed. 786;
Lewis v. Clark, 129 Fed. 570;
Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160.

II.

Laws of the State of Michigan are Part of Charter of American Life Insurance Company

It has become fundamental that the laws of the domiciliary state of a life insurance company are a part of its charter. This was first pointed out in the case of *Relf v. Rundle*, supra, when the Court said:

> "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution. * * * The appellees (insured), when they contracted with the Missouri Corporation, impliedly agreed that if the Corporation was dissolved under the Missouri laws, the Superintendent of the Insurance Department of the State should represent the Company in all suits instituted by them affecting the winding up of its affairs."

Under the contracts between the Iowa Company and the Michigan Company, all of the insurance business and liabilities of the Iowa Company were conveyed to and assumed by the Michigan Company. (Ex. A, B & C, 203-218). All assets of every kind and character then owned by the Iowa Company were conveyed to and vested in the Michigan Company. Among the assets of the Iowa Company specifically conveyed to the Michigan Company was the deposit with the Insurance Commissioner of the State

of Iowa, which was in a face amount equal to reserves on all policies in force in the Iowa Company. Pursuant to the terms of the contracts of reinsurance, and as contemplated thereby, the Michigan Company issued to all the policyholders of the Iowa Company a certificate of assumption of policy liability (Ex. 2, 227). Under the terms of that certificate all policy rights, privileges and benefits theretofore contracted to be made by the Iowa Company were assumed by the Michigan Company. The certificates of assumption were furnished to each policyholder of the Iowa Company, who accepted them and retained them, and by virtue of the issuance and acceptance of said certificates of assumption, the policyholders of the Iowa Company became and thereafter were policyholders of the Michigan Company. The effect of the reinsurance agreement and the acceptance of the assumption certificates by the policyholders of the Iowa Company was that they acquired new insurance protection. The new protection came from the Michigan Company. The liability of the Iowa Company for the respective sums specified in its policies was ended and was replaced by the liability of the Michigan Company, backed up by all of the assets conveyed to the Michigan Company plus all of the assets that the Michigan Company owned. This created a novation in which the Michigan Company was substituted for the Iowa Company in regard to all liability. Thereafter, the Iowa Company was dissolved and terminated as a corporate entity. Later in this brief we shall discuss more specifically the proposition of novation.

Pursuant to the terms of the contract the Michigan Company continued the deposits as therein provided and continued to write insurance in the several states of the Union without notice to any of the new policyholders or any of the old policy holders of the Michigan Company that the group of policyholders taken over from the Iowa Company were especially protected. The annual reports made by the Michigan Company to the various Insurance Departments subsequent to 1921, and upon which certificates to do business were issued (245-278) did not disclose this fact. The contracts of reinsurance, Exhibits A, B and C, themselves do not state that the deposit was continued in the State of Iowa for the benefit of

any particular group of policyholders. It is our contention that the Michigan law is a part of the charter of the Michigan Company, which the Iowa policyholders accepted in lieu of the Iowa Company, and it is to the Michigan receiver and assets of the Michigan Company that they must look, now that insolvency has intervened. In this we are supported by sound authority. Among others we depend on three more cases involving the Life Association of America.

In the case of *Rundle v. Life Assn. of America,* 10 Fed. 720, which is a companion case to the Supreme Court case of *Relf v. Rundle,* supra, the Court said:

> "It must be that as members of a corporation they (the policyholders) have assented to the laws of the state of its creation, which, upon its being dissolved, control the settlement of its affairs; i.e., they have assented that the officers by whom, and the place and manner, shall be such as the laws of the State of Missouri prescribe.
>
> "There must be a common method by which the amount due by or to each policyholder shall be ascertained, and this must be done by a common representative. This is the contract to which the plaintiffs bound themselves when they subjected themselves to the operation of the organic law of the corporation by becoming members of it. They cannot, therefore, now ask the court to protect them in the exercise of a right which they expressly relinquished. The effect which is wrought by this contract and assent to the laws of the state of Missouri makes the territorial extent of the authority of the superintendent to administer co-extensive with the authority of an assignee in bankruptcy, or a receiver of a national bank, springing from the territorial effect of a national law."

Such is the position of the policyholders of the Iowa Company. By retaining the assumption certificate they became a member of the Michigan Company and a creditor of it. They assented to the law of the State of Michi-

gan which created it, and they assented to the proposition that, in case of insolvency, distribution would be made by the Commissioner of Insurance of the State of Michigan as statutory receiver and that that distribution would be in accordance with the laws of the State of Michigan. It is too late now for them to place themselves back in the position they were in in 1921 and look for special benefit to the deposit with the Insurance Commissioner of the State of Iowa.

In the case of *Davis v. Life Association of America*, 11 Fed. 781, Davis as a policyholder of the Life Association of America in the branch of that company which was co-extensive with the State of Alabama, contended that the assets deposited in the State of Alabama were intended as a special security for the exclusive benefit of the policyholders of the Department of Alabama and that, therefore, the assets thus retained in Alabama should be distributed among the Alabama policyholders. In the course of his opinion, the Court said:

> "This reserve fund, or premium reserve, was the fund which was to be invested and kept in Alabama, and this amount represented the value, at any time, of the outstanding policies of the Alabama policyholders, and it is insisted that the fixing of the amount to be kept invested in Alabama at the exact amount necessary to reimburse them, at any time that the association should cease to be a going concern, shows that a special security for such policyholders was intended, and that the fund thus created and kept, or to be kept, in Alabama is a trust for the payment of the Alabama policyholders, and the local trustees are charged with the execution of the trust."

But, in deciding against this contention, the Court referred to the case of *Relf v. Rundle*, supra, and stated that by the charter of the Life Association of America the policyholders must be governed by the operation of the law of the state of the domicile of the company, and after quoting from that case, the Court said:

> "This reasoning of the Supreme Court of the United States is an answer to the argument made on this point, and the complainants here cannot be heard to say that they are not bound by the law of the corporation of which they became and are members."

Petitioner refers to the above case in his brief as the case of *Relf v. Rundle* after it was sent back to the Federal District Court for trial on the merits. He is in error in that statement. The case of *Relf v. Rundle* arose from the Circuit Court of the United States for the District of Louisiana. The above case arose from the Circuit Court for the Southern District of Alabama. The only similarity between the cases is that each arose out of the receivership of the Life Association of America and each involved the claim of policyholders that the deposit in their respective States should be administered in that State for the benefit of the residents of the State and should not be removed to the State of Missouri for administration by the domiciliary receiver.

In the case of *Taylor v. Life Association of America*, 13 Fed. 493, a policyholder in Tennessee claimed a return of premiums for policies not matured by death or otherwise, and attempted to attach the assets within the State of Tennessee, which were the investments made by the Tennessee branch of the Life Association of America. A receiver was appointed in Tennessee, who defended on the ground that the corporation was already being administered in insolvency by the State of Missouri, the State of its creation, and that a receiver had been appointed who was proceeding to wind it up according to the law and rights of the parties. By an amended bill Taylor claimed that the company did business in departments and separately in each state under separate board of directors, and that according to the constitution and by-laws and under the contract expresssed thereby, the policyholders in each department had a lien or priority on the assets in that department for the satisfaction of their policies. In deciding against this contention, the Court said:

"They derive all their rights through the laws of Missouri; and their contracts with each other, namely, their policies, are governed by these laws and the contract itself. They cannot, when the storm of insolvency comes, separate themselves from this peculiar relation, and claim as *creditors* in the ordinary acceptation of the term; treat their co-members as other creditors, and the corporation as an independent entity, and run a race for an inequitable preference in the assets on any notion that, as citizens of this state and creditors, they may have all the assets here. * * * Our own state court has established that we will give effect to the laws of another state regulating its corporations whenever the rights of the litigants before the court depend upon them, as they clearly do in this case."

And later on in the opinion, the Court said:

"This disposition of the case likewise finds support in the adjudications made in other circuits; *and, having no toleration for the disastrous determination of creditors to seek administration of these assets in many states, instead of in the one under whose laws they have all been acting, and by which they are bound in their enterprise, unless for more substantial reasons arising out of unjust discriminations in that state than any appearing in this case, I more readily yield to their authority.*" (Citing cases referred to above) (Italics supplied).

Likewise, in the case at bar, the Iowa policy-holders have no right "in the storm of insolvency" to consider themselves in a class by themselves and not bound by the laws of the State of Michigan, which are a part of the charter of the company they became members of by retaining the assumption certificates and paying the premiums upon their policies through the years.

In the case of *Fry v. Charter Oak Life Ins. Co.*, 31 Fed. 197, we have a Connecticut insurance company which became insolvent. A Missouri policyholder contended that the property of the corporation in the State of

Missouri, which was not a deposit, could be seized when the company became insolvent, and applied to the benefit of the Missouri policy-holders. In denying this contention, the Court said:

> "The charter of the company, and the 'winding-up act' of the state of Connecticut, which must determine the rights of policyholders as between themselves, and as between themselves and the company, did not contemplate that there should be a mere 'race of diligence,' as between policyholders, in the event of insolvency. When plaintiff became a member of the company he assented to that form of supervision which the state of Connecticut undertook to exercise for the benefit of policyholders over the affairs of the company while it was a going concern, and impliedly agreed that there should be a valuation of all policy obligations according to a certain standard, and an equitable distribution of the company's assets in the event of insolvency."

All the cases cited by us above are cited to this proposition by the court.

Another case involving the receivership of the same company is that of *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305. In that case a policyholder in the State of Iowa attempted to seize for the benefit of the policyholders of Iowa assets of the value of $100,000.00 situated in the State of Iowa. In denying the contention of the policyholder, the Court in the course of its opinion said:

> "Turning, now, to the laws of the State of Connecticut, we find it enacted that, if the insurance commissioner of the state shall find an insurance company organized under the laws of that state to be insolvent, 'he shall bring a petition to the superior court of the county in which the principal office of such company is located, if in session; and, if not, to a judge of the supreme court of errors, praying for the appointment of a receiver, and that the charter of the company may be annulled;' it be-

ing further provided that the court or judge may appoint a receiver, make all necessary orders in reference to the delivery to and possession by such receiver of the assets and property of such company, and the sale and conveyance of the same by him, and may direct the application of the avails of such assets and property equitably, in satisfaction of the claims proved against such company, and the payment of the present value of its outstanding policies, either in whole or in part, or to the reinsurance of its outstanding policies in some solvent company."

The Court then pointed out that this was the method set up in the State of Connecticut for winding up the affairs of an insolvent insurance corporation, and the Court said:

"When the assets and fund to be distributed is a common one, derived from the payments made by all creditors, as in case of an insurance company, the fact that part or the whole of the assets may be invested in any one state does not give to the creditors residing in such state a superior right thereto. As already stated, the charter of the Charter Oak Company secures to its policyholders and creditors the right to an equitable participation in the assets of the company, in case of insolvency and dissolution. To bring about such equitable distribution of its assets, the charter and laws of Connecticut provide for the appointment of a receiver to take charge of the property of the company in case of its dissolution, and the duty imposed upon such receiver is not materially different from that imposed upon the state superintendent under the Missouri statute construed in *Relf v. Rundle.* For the purpose of collecting the assets of the company, he is the successor of the dissolved corporation. He is in fact a trustee, representing the interests of the stockholders and creditors of the company; deriving his authority not alone from the order of the court appointing him, but from the charter of the company and the statute of the state creating the corporation. * * * The provisions

of the charter estop the complainants, who, as policyholders, are bound by its terms from denying the right of other policyholders to an equitable participation in the assets of the company; and they cannot object to the enforcement of the method provided by the charter and laws of Connecticut, forming part thereof, for securing such equitable distribution in case of the dissolution of the corporation."

Thus the local policy of the State of Iowa as to the rights of its citizens in Iowa assets of an insolvent life insurance company is succintly stated. It, therefore, can not be disputed that the laws of the State of Michigan became a part of the charter of the American Life Insurance Company, and those policyholders who originated with the Iowa Company are bound by that charter which is constituted in part by Michigan law, and is so recognized by a Federal Court in Iowa.

III.

Administration of the Deposited Assets Solely in the Michigan Receiver

The facts clearly disclose that the liquidation or insolvency proceedings under the Michigan statute were initiated in Michigan in the Circuit Court for the County of Ingham in Chancery on April 12, 1938, some sixty days prior to the initiation of any proceedings in the Iowa Court. The Michigan proceedings have never been abandoned, but have been pressed with all orderly expedition, and in due time the respondent Emery was appointed statutory receiver, and by operation of the statute all assets of the American Life Insurance Company, including the Iowa deposit, vested in him. The Ingham County Circuit Court had jurisdiction over and possession of all of the assets of the American Life Insurance Company, save that perhaps manually some of these assets might be rightfully or otherwise in the possession of others, under titles, however, not adverse to, but subordinate to the Michigan receiver. Under these circumstances the Michigan Court should have exclusive juris-

diction of the involved res and of all litigation with respect to it, including conflicting claims thereto, liens upon, and other rights therein. The right to administer those assets would be in the domiciliary receiver. The treatment that the policyholders originating in the Iowa Company should be accorded must be determined by the domiciliary receiver under the direction of the Michigan Court.

Again referring to the case of *Relf v. Rundle*, supra, it was said by Mr. Chief Justice Waite, in writing the opinion of the Court:

> "No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.
>
> "By the charter of this Corporation, if a dissolution was decreed, its property passed by operation of law to the Superintendent of the Insurance Department of the State, and he was charged with the duty of winding up its affairs. Every policyholder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the Corporation can insist shall be regarded. The appellees, when they contracted with the Missouri Corporation, impliedly agreed that if the Corporation was dissolved under the Missouri laws, the Superintendent of the Insurance Department of the State should represent the Company in all suits instituted by them affecting the winding up of its affairs."

This clearly indicates that the domiciliary receiver is the one with whom the Iowa policyholders must deal, and he is the one to represent them in the liquidation of all assets, including those in which they claim a preference.

Referring again to the case of *Fry v. Charter Oak Life Ins. Co.*, supra, therein the Court said in the course of its opinion:

> "The proceeding now pending in the state of Connecticut, as before explained, is essentially a suit by the state to annul the defendant's franchise, and liquidate its affairs. It is a special statutory proceeding, applicable to insurance companies whose capital has become impaired. In that class of cases it is the rule that the filing of the complaint by the state operates as a sequestration of the corporate property, for the purposes contemplated by the statute under which the proceeding is brought, from the filing of the complaint, and not merely from the entry of a final decree."

And the course of the opinion, relegating the policyholder to treatment by the domiciliary receiver, the Court said:

> "Plaintiff is a member of the defendant company, and as such is entitled to participate with other policyholders in *a pro rata* distribution of its assets. A suit was pending in the home state to accomplish that result when this action was filed. The plaintiff in that case represents all the policyholders, as well as other creditors of the company; the proceeding is for their benefit; and it is only by means of a suit of that character that the rights of all the policyholders of the company can be secured. Nothing but confusion and inequality can result from entertaining a suit of this nature in this jurisdiction."

And in *Parsons v. Charter Oak Life Ins. Co.*, supra, the Court said:

> "The laws of Iowa, as well as those of Connecticut, recognize the fact that 'equality is equity,' when the assets of the insolvent corporation are to be distributed. As there is not to be found in the statutes of Iowa any provision attempting to secure superior rights to Iowa creditors in the assets of the company situated in Iowa, and as the charter of the company does not confer such, it follows that, if the Iowa creditors have such superior right, it must be based upon the idea that the state recognizes the claims of Iowa citizens to property found in the state to be always superior to those of non-residents; and, if this be true, then, in all cases of administration of estates, assignments for benefit of creditors, creditors' bills, foreclosure of railroad and other mortgages, and in all other cases in which a a court of equity is called upon to marshal assets and distribute the same, the superior equity of the citizens of Iowa must be recognized, and the equally meritorious claims of non-residents must be postponed until the Iowans are paid in full. The statement of the proposition ought to be its sufficient refutation."

The Court then went on to point out that proceedings had been instituted in the proper court in Connecticut for the final dissolution of the corporation and for the distribution of its assets among its creditors, that a receiver had been appointed with authority to take possession of the assets of the company, sell the same, and distribute the proceeds equitably among the creditors. The Court refused to interfere with the possession of the Connecticut receiver, and held, after citing *Relf v. Rundle*, that as the statute of Connecticut provides for the appointment of a receiver, it was a part of the contract of the policyholders that, in case of insolvency, such receiver should marshal all the assets so that his powers were not limited as those of a receiver usually are, but that the Connecticut receiver controlled all the company assets.

This is exactly the proposition that we are contending for in the case at bar. This same principle has been enunciated in the case of *Smith v. Taggart*, 87 Fed. 94. That case involved the Granite State Provident Association organized under the laws of New Hampshire. It did business in about twenty States of the Union, among others, in the State of Colorado. Eventually the receivership proceeding was instituted in the State of New Hampshire. David A. Taggart was appointed statutory receiver of the corporation for the purpose of liquidating its affairs. Two stockholders residing in Colorado filed a bill in the District Court praying for the appointment of a receiver in Colorado. One Albert L. Murray was appointed by the Court. J. W. Smith and a number of other stockholders of the association resident in Colorado filed an intervening petition praying that Murray should hold the funds realized from collections made in Colorado for distribution among the Colorado stockholders. Taggart intervened in this suit and prayed in substance that the fund realized by the Colorado receiver in winding up the affairs of the association in the State of Colorado be turned over to him, to the end that all of the funds of the Association, when collected, might be ratably distributed among all members of the Association. The case was removed to the Circuit Court of the United States for the District of Colorado, where a decree was entered that the funds collected by Murray be applied and distributed in like manner as all other funds realized in winding up the Association, and to that end, that the Colorado receiver be directed, after paying the expenses of his trust, to pay over the funds to Taggart, the statutory receiver, to be by him accounted for in the Supreme Court of New Hampshire. This decree was affirmed upon appeal to the Circuit Court of Appeals of that Circuit. Circuit Judge Thayer, speaking for the Court, said:

> "Inasmuch, then, as a contract must be implied from the nature of the Association requiring its funds to be distributed ratably among all the members according to their several contributions, it is manifest that such a distribution can be more conveniently and speedily made by a single court than by

numerous courts sitting in different jurisdictions; and the rule of comity which prevails among courts, in our judgment, requires that the duty of making the distribution should be devolved upon the New Hampshire court, that being the court in which a suit to liquidate the affairs of the insolvent company was first filed. Applying the rules of comity, there can be no doubt, we think, of the right and duty of a court of equity which has acquired possession of a part of the assets to direct them to be transmitted to the court of primary jurisdiction, to the end that they may be there distributed ratably among all the members of the Association, in proportion to their contributions to the capital of the corporation.

"The question which is presented by this record is not new, but has been considered at length and decided by the court of last resort of several states. It was held by the supreme judicial court of Massachusetts, in an alaborate opinion, in the case of *Buswell v. Supreme Sitting*, 36 N. E. 1065, that where a mutual benefit association, with a reserve fund held by the subordinate lodges in different states, but owned and controlled by the supreme lodge, became insolvent, and a receiver was appointed with power to collect the assets wherever found, and to wind up the association, ancillary receivers of the several branches should be ordered to transmit such reserve fund to the general receiver. The same view has been taken in the states of New Jersey, Louisiana, and Michigan *(Ware v. Supreme Sitting* (N.J. Ch.) 28 Atl. 1041; *Durward v. Jewett*, (La.) 15 South 386; *Baldwin v. Hosmer*, (Mich.) 59 N. W. 432); and by several other courts as well *(Failey v. Talbee*, 55 Fed. 892; *Parsons v. Insurance Co.*, Id. 197). See also *Relfe v. Rundell*, 103 U. S. 222."

The case of *Blake v. Old Colony Life Ins. Co.*, 209 Fed. (8th Circuit) 309, certainly points the way, if it is not conclusive, as to the determination of this case. The Cosmopolitan Life Insurance Association, an Illinois

corporation, made application to transact business in the State of Missouri. The Superintendent of Insurance informed it that before a license could be granted for the class of business it intended to carry on in that state, it would be necessary to deposit $5,000.00 in money or securities with the Department. The construction placed upon the Missouri statute by the Department was that all companies, foreign or domestic, must make such deposit before authority to do business in the State could be properly issued. The Cosmopolitan Association made the deposit as required by the Insurance Department, and a license to do business in Missouri was granted. Contemporaneously with this application on the part of the Cosmopolitan Association, that company had undertaken to reinsure the business of a fraternal insurance company known as the Royal Tribe of Joseph, then doing business in the State of Missouri. The reinsurance agreement was approved by the Missouri Department upon the making of the deposit and the issuance of the certificate of authority for the Cosmopolitan Association to do business in that State. This certificate was renewed in 1904 and 1905, and the company continued to do business until January 1, 1906, when it withdrew from the state, but the securities originally deposited were continued in the state after its withdrawal. In 1909 an agreement was entered into between the Cosmopolitan Association and the Old Colony Life Insurance Company, an Illinois corporation, whereby the latter company purchased all the assets of the Cosmopolitan Association of every character and description, and agreed to assume all liabilities of the Association for death claims and all other liabilities of such Association. The Old Colony Life Insurance Company made demand upon the Insurance Department of Missouri for the delivery to it of the deposit. Meanwhile, a number of suits were filed in Missouri against the Cosmopolitan Association, and in some cases against the Old Colony Life Insurance Company by persons holding policies of the Cosmopolitan Life Insurance Association issued while it was doing business in that state. Judgments were afterwards secured against the Cosmopolitan Association, aggregating about $2,000.00. Steps were taken under the Missouri statutes to subject this

deposit to the payment of these judgments. The Old Colony Life Insurance had on deposit with the State of Illinois, pursuant to the statutes of that state, $221,000.00 worth of securities. Upon these facts the District Court found and held:

1. The insurance laws of Missouri do not require a deposit with the insurance department by foreign insurance companies doing business in that state on the stipulated premium plan.

2. Plaintiff (Old Colony Life Insurance Company) is the owner of the securities sued for, and is not estopped from demanding the return of such securities from the defendant (Insurance Commissioner).

3. That no trust was created vesting in the insurance commissioner, either as an official or as an individual, the right to hold these securities for the exclusive benefit of the Missouri policyholders of the Cosmopolitan Association, or otherwise.

4. That the plaintiff (Old Colony Life Insurance Company) is therefore entitled to recover.

This finding by the District Court was affirmed by the Circuit Court of Appeals. In the course of the opinion written by Circuit Judge Smith, it was said:

> "There was nothing said between the parties as to who were the beneficiaries of the supposed trust. The insurance department thought it was to secure the Missouri policyholders, but there is nothing to indicate the Cosmopolitan Company so understood it, or understood the beneficiaries of the trust were different from what they would have been if the money had been deposited in Illinois. If we could ascertain who the beneficiaries were, whether all policyholders or only the Missouri policyholders, what policies did it secure? The holders of membership in the Royal Tribe of Joseph had no security, and there was no agreement they should have any. Was the trust simply for the benefit of insurers on the stipulated premium plan, or did it include the members of the former fraternal insurance society?

> We do not know and there is not a syllable of evidence tending to enlighten us. It is evident that if there was a trust, no individual has shown that he or his claim was secured by the trust by clear or convincing, or any other kind of, evidence and the whole matter remains doubtful and uncertain, and the same is true of the claim of estoppel which is not specially pleaded.
>
> "The case in this court of *Illinois Life Insurance Co. v. Tully,* 174 Fed. 355, 98 C. C. A. 259, is quite like the case at bar, and disposes of many of the questions argued here."

In the case of *Illinois Life Insurance Co. v. Tully* cited above, in the course of its opinion, the Court said:

> "We have assumed, as was apparently done below, that the treasurer was the trustee for or stood in such privity with the policy holders as to be entitled to make any defense to this action which they might have made had they been parties to it. But in view of the conclusions already reached that he is a mere volunteer, a bailee assuming to act without authority of law or contract, it is questionable if he can invoke for his justification in this case any of the rights of the policyholders."

It is significant that the contract upon which the petitioner's claim must necessarily be made does not state that the policyholders in the Iowa Company are to benefit from the Iowa deposit to the exclusion of all other policyholders. There is nothing to indicate in the contract that the parties at the time so understood such to be the purport of the deposit. The contract does not contain such wording as to create a trust for the benefit of any particular group of policyholders. On the other hand, there is much to indicate that such was not the intent of the parties. The annual reports filed by the Michigan Company in the various states specifically failed to state such to be the fact, although the question was asked in the form of these reports. The interim policies issued while the Michigan Company was qualify-

ing in the various states in which the Iowa Company was permitted to do business significantly omitted from the policy form the recitals which were on the form previously used by the Iowa Company. The record is barren of any act of any character which would in any manner indicate an intent to give to the policyholders originating in the Iowa Company preferential treatment of any kind.

Up to this point the cases cited are among the older cases upon this subject matter, but there has been no change in the rule, as is demonstrated by a number of recent cases which we now propose to refer to.

In the case of *Motlow v. Southern Holding & Securities Corporation*, 95 Fed. (2d) 721, (Certiorari Denied 305 U. S. 609), the Southern Surety Company was in liquidation in New York, and the plaintiffs brought suit in Missouri to set aside certain transfers as having been made by the Southern Surety, the effect of which was to defeat the plaintiff's claim. In holding that the jurisdiction of the New York Court was exclusive, and that the Missouri Federal Court could not entertain the plaintiffs' complaint, Judge Sanborn, speaking for the Court, among other things said on page 725 of the report:

> "Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence, other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation. This should be particularly true as to proceedings for the liquidation of insolvent insurance companies for the reasons adverted to by Mr. Justice Cardozo in *Clark v. Williard*, 292 U. S. 112, 123, 54 S. Ct. 615, 620, 78 L. Ed. 1160."

And at the close of the opinion he said:

> "We are convinced that the title to the cause of action which the plaintiff attempts to assert was vested, by the order of liquidation of the Supreme Court of New York and by the statutes of the state of New York, in the superintendent of insurance of that state, that he still has title thereto, and that the allegations of the plaintiff's bill were insufficient to entitle the plaintiff to maintain this suit and to confer upon the court below any jurisdiction of the subject matter."

This case goes to the very heart of the contentions of this respondent. Title to the assets in suit were vested in the Michigan receiver as of April 12, 1938, and no Iowa Court, State or Federal, has any jurisdiction over the subject matter.

The case of *International Co. v. Occidental Life Ins. Co.*, 98 Fed. (2d) 138, (Certiorari Denied 305 U. S. 639) is one of several that we shall refer to involving the Federal Reserve Life Insurance Company insolvency proceedings. In that case Judge Woodrough wrote the opinion denying access to the Missouri Federal Court to enforce certain provisions of a reinsurance contract against the Occidental Life, which reinsured the business of the Federal Reserve Life in insolvency proceedings in Kansas, said:

> "It seems to us that none of the cited cases sustains the plaintiff's right to maintain its suit in the Missouri court. We think the suit would wrongfully interfere with the control of the Kansas court over the property in its lawful custody and that the effect of granting the relief prayed for would be to deprive the Kansas court of the jurisdiction reserved by it."

Another case involving the Federal Reserve Life Insurance Company is that of *Holloway v. Federal Reserve Life Ins. Co.*, 21 Fed. Sup. 516. Although this is a District Court decision, it is so well reasoned that we feel it is a helpful case. The United States Reserve Life In-

surance Corporation, a Missouri company, engaged in life insurance business in compliance with the Missouri law, deposited securities with the Missouri Commissioner, and thereafter reinsured its business in the Federal Reserve Life Insurance Company, a Kansas corporation. The reinsurance was effected under the Missouri statutes and approved by a Commission somewhat similar to the Iowa Commission. The reinsurance contract constituted a complete novation of outstanding contracts. The Federal Reserve continued to maintain the deposits with the Missouri Department until it ceased doing business because of insolvency and the appointment of a receiver in proceedings initiated in the Federal Court of Kansas. Ancillary receivers were appointed by the District Court of the Western District of Missouri for the property and assets within Missouri, and upon the application of the Missouri ancillary receivers, the Missouri Insurance Commissioner was required to show cause why he should not surrender the deposited securities to the ancillary receivers to be transmitted to the primary receiver. The Court observed that the reinsurance agreement "effected a transfer of the title to said assets to a non-resident corporation," the Federal Reserve, and continuing, the Court said that the law does not provide for the liquidation or disposition of such assets by the Superintendent of an Insurance Department when they belong to a foreign corporation. This is substantially the situation at bar. The Court then observed that it was the duty of the Missouri Commissioner to hold those securities while the Federal Reserve was doing business and to do so as trustee for the Missouri policyholders, but District Judge Reeves said:

> "A court of competent jurisdiction has taken over the Federal Reserve Life Insurance Company. It becomes the duty of the court to direct the collection by its receiver *of all the assets of the company so that same can be equitably and properly applied to the discharge of the obligations of said company.* The court alone is capable of determining what priorities, preferences, and liens may be allowed and enforced against said assets. The responsibility of the superintendent of insurance as an executive offi-

cer is completely discharged when a court, whose duty it is to administer the estate, calls for a surrender and delivery of said assets. *32 C. J. 12, p. 98.*

"The superintendent of insurance cannot properly disregard the demands of a court in the regular routine administration of an estate. *Granted that such securities are impressed with a lien, the court must be trusted to hold a disposition to enforce such liens.* It is unimportant that a reinsurance may have been effected in another company under the direction of the court. The chancellor must have a free hand to direct the conversion or sequestration of assets for the protection of any class of creditors." (Italics supplied)

The Court closed its opinion by saying:

"The federal court, having taken jurisdiction, will afford complete relief * * *. A careful examination of all the authorities as well as applicable statutes convinces that the question of the duty of the superintendent of the Insurance Department to surrender the securities is not even a debatable one.

"Accordingly, an appropriate order will be made directing the superintendent of the Insurance Department of the State of Missouri to surrender said securities to the ancillary receivers, as requested by them."

Another case bearing upon this question is that of *Holley v. General American Life Ins. Co.*, 101 Fed. (2d) 172, (Certiorari Denied 307 U. S. 615). In that case the Missouri State Court had approved the sale of assets of the insolvent Missouri State Life Insurance Company to another Missouri insurance company, the General American Life Insurance Company. A suit was instituted attacking the decree. After holding that it was a collateral attack upon a State Court decree which could not be made in Federal Court, Circuit Judge Sanborn said:

"Moreover, it is the established rule that the liquidation of a domestic insurance company under the laws of the state of its domicile, where such laws

furnish a comprehensive method for the winding up of its affairs by an officer of the state under the jurisdiction of a court of the state, cannot be interfered with by a federal court."

It is the position of this respondent that, since Michigan has a comprehensive method for the winding up of the affairs of a Michigan insurance company, that no court, State or Federal, in any other jurisdiction can interfere with the liquidation of the assets of the insolvent company, no matter where they may be located. Other cases supporting this proposition are *Hutchins v. Pacific Mut. Life Ins. Co.*, 97 Fed. 58; *Hobbs v. Occidental Life Ins. Co.*, 87 Fed. (2d) 380, (Certiorari Denied, 305 U. S. 603); *Kansas v. Occidental Life Ins. Co.*, 95 Fed. (2d) 935, (Certiorari Denied, 305 U. S. 603).

To permit the Iowa receiver to administer the assets in the deposit in suit, and to accord treatment to the Iowa policyholders, would lead to endless confusion and inequitable treatment, not only to the policyholders originating in the Michigan Company, but to those in the Iowa group. If life insurance companies were federalized, such confusion and inequitable treatment could not result, but, as we have pointed out, in the absence of federalization, the legislatures and the courts have maintained a uniformity of administration and treatment by granting to the domiciliary state of the insolvent life insurance company the sole and exclusive power of administration of assets wherever located.

It cannot be upon any principle of equity that the petitioner seeks to secure the administration in his State of the deposited assets. The record shows that the average age of these policyholders is in excess of sixty years. (380). It would be difficult, if not impossible, for these policyholders to secure other insurance. All but 81 of them have accepted the assumption agreement of the respondent American United Life Insurance Company and are depending upon that company to fulfill the policy contract which they hold. For a period of ten years in the case of maturity of the policy by death, the face amount of the policy will be paid. Under the reinsurance

agreement, if they are entitled to preferential treatment, provision is made for such treatment, but it should be the Michigan Court which should decide that question. Petitioner is not representing Iowa citizens as such. He is acting in disregard of a substantial body of citizens of his State who have an interest in the outcome of the administration of these assets. With the whole picture before us it is difficult to define the purpose of the petitioner if it is other than a selfish one. On the other hand, this respondent is under a duty imposed upon him by the statute of the State of Michigan to administer all of the assets of the company in whatever state they may be located and in such manner as to bring equality and equity to every policyholder in the Michigan Company as of April 12, 1938.

As to the 81 policyholders who dissented, they have submitted themselves to the Michigan court by filing their claims with it. They can not now look to an Iowa court for treatment. This point was clearly established in the case of *Phipps, et al. v. Chicago, R. I. & P. Ry. Co.*, 284 Fed. 945. That case held that a cestui que trust is bound by the decree of the court when he has filed and proved his claim under such decree. In the course of its opinion the Court said:

> "It is contended that Mr. Phipps was not within the jurisdiction of the court below, because he was not a party to the original creditors' suits, and consequently was not bound by the decrees. The position is untenable. He was one of the cestuis que trust of the District Court of the Northern District of Illinois, for whom it held all the property of the insolvent company; he was one of the unsecured creditors on whose behalf the creditors' suits were brought; and he filed and proved his claim as such under the decree. That court thus obtained plenary jurisdiction to hear, adjudicate, and dispose of his claim to any interest in or lien upon that property.
>
> "Moreover, an application at the foot of a decree or dependent suit may be maintained by the party to the original decree in a federal court, or by one who claims under such a decree against one who as-

> sails that decree, or any adjudication in it, in a subsequent suit or proceeding in a court with no appellate jurisdiction, on the ground that it is illegal or ineffectual, although the latter party was not a party to the original suit, the adjudication or the decree. *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; *Virginia-Carolina Chemical Co. v. Home Insurance Co.*, 113 Fed. 1, 6, 51 C. C. A. 21; *St. Louis-San Francisco Ry. Co. v. McElvain* (D.C.), 252 Fed. 123, 129."

Another case supporting this principle is *Wilson v. Keels*, 54 South Carolina 545; 71 Am. St. Reports 816.

We, therefore, most strenuously insist that the Federal court had no jurisdiction over the subject matter of this action, and that the administration of the portion of the assets of the American Life Insurance Company at issue should be turned over to the domiciliary receiver.

As pointed out in the Statement of Case in this brief, Section 12,377, *Compiled Laws of Michigan*, 1929, provides that deposits required by any state in the United States or in any foreign country shall be held for the benefit of the policyholders of the company making the deposit. Similar statutes have been construed in other states, such as in the State of Illinois, where it was held in *People ex rel. Palmer, Director of Insurance v. State Life of Illinois*, 296 Ill. App. 337, 15 N. E. (2nd) 985, that such statutory provisions meant that the owners and beneficiaries of policies of insurance were the only persons intended to be protected, and that in the case of insolvency such funds could not be used for the benefit of any but policyholders or their beneficiaries.

If the theory of the petitioner is correct, it must follow that the Commissioner of Insurance of the State of Michigan, when he approved the contracts in issue, did so in contravention of a Michigan statute. It can never be presumed in the absence of clear and direct proof that a state official is acting in violation of the law of his state.

On the other hand the administration of the assets in question by the domiciliary receiver is entirely consistent

with the local policy of the State of Iowa as established by its statutes or the opinions of its highest court. We can not emphasize too strongly that the petitioner is not representing Iowa citizens. Rather he is pretending to represent citizens in 41 other states and many foreign countries. He is acting in entire disregard of the rights of the 1,707 policyholders residing in Iowa but originating in the Michigan Company. (384) He also fails to distinguish between the rights of a general creditor of an insolvent corporation who is a citizen of a given state in asserting a right to have his claim paid out of property in that state, and the claim of a policyholder in a life insurance company.

This difference is so great that the decisions of appellate courts in reference to such general creditors are no basis for establishing the rights of life insurance policy creditors. A creditor against an insolvent life insurance company by virtue of a policy he holds or being a beneficiary of a policy is a distinct type of creditor. Such a creditor is distinct from a creditor against an insolvent surety company, whose claim comes into existence because of the default of some person bonded by that surety company. Such a claim is distinct from the creditor against an insolvent fire insurance company, whose claim is based on account of a loss, the risk of which was insured by such company. The relation of a life insurance policyholder to the life insurance company is a peculiar one as compared to other types of creditors. It is something fundamental in life insurance itself. It is not easy to make plain the peculiar characteristics of a policy creditor of a life insurance company, but something of its character is stated in *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed 305, when the Court said:

> "When the assets and fund to be distributed is a common one, derived from the payments made by all creditors, as in case of an insurance company, the fact that part or the whole of the assets may be invested in any one state does not give to the creditors residing in such state a superior right thereto."

Life insurance not only insures against the risk of death which is inevitable, but there is an investment feature always involved in ordinary life policies. The business is necessarily nationwide in character. Citizens of many states contribute to a common fund to the end that upon the death of the insured the proceeds of a policy will stand in lieu of savings which theoretically should have been made by the insured in his lifetime, and it is a common fund which represents in many cases the sole investments of the insured persons. In a real sense each policyholder in a life insurance company contracts with every other policyholder in that company. When an individual takes out a policy in a life insurance company in a foreign state, he consents to be bound by the laws of that state in the administration of the affairs and assets of the company, both before and after insolvency. Creditors of other kinds have never made such election or had an opportunity to make such an election.

The result has been that the legislatures in the various states and appellate courts have uniformly provided that one policyholder in a company beecause of his place of residence shall not benefit over another. It is this distinction which the petitioner fails to recognize, and it is a distinction that Circuit Judge Johnsen in his dissenting opinion in the court below failed to take into consideration.

The Iowa statute upon which petitioner relies, as we have pointed out before, applies only to domestic insurance companies in the State of Iowa. It does not apply to a situation where the insolvency occurs in a foreign insurance company permitted to do business in the State of Iowa. This distinction was clearly pointed out in the case of *Blake v. Old Colony Life Ins. Co.*, supra, when in reference to a Missouri statute, it said:

> "Manifestly the provision in 6985 has reference to domestic companies, and to the only securities required to be deposited by foreign companies, and they are the ones referred to in section 6985 as to be returned. The Legislature could have required foreign companies to make a deposit in trust, and could have

defined who its beneficiaries should be, and of what the trust should consist, but it did not do so. It follows that the securities were deposited without authority of law.

• • •

"Ignoring any question as to the statute of frauds of Missouri, a trust in personalty may be established by parol evidence, but such evidence must be clear and convincing, not doubtful, uncertain, or contradictory. *Allen v. Withrow,* 110 U. S. 119, 129, 3 Sup. Ct. 517, 28 L. Ed. 90. Who was the beneficiary of the supposed trust, and what were its terms?

• • •

"There is nothing on the face of this statute that limits the benefits of the securities to domestic policyholders, and the insurance department was satisfied with a deposit in Illinois, which would certainly not have been for the exclusive benefit of policyholders in Missouri. These securities were deposited and a certificate to do business in Missouri was issued, which made no reference to the securities. There was no declaration of trust, and nothing to indicate why or for whose security they were deposited."

The statute of Iowa did not require such a deposit as we are now dealing with, but, even if the statute does apply as is claimed by the petitioner, there is nothing in it that limits the benefit of the securities so deposited to domestic policyholders or to the policyholders of any company which may have been reinsured. The whole tenor of the Iowa statute is otherwise. It seems to be clear that the tenor of the Iowa statute is that the deposits are for the benefit of all policyholders. In that portion of the statute wherein it is provided that, if a foreign insurance company has a deposit in its home state or in any other state in the amount of $100,000.00 or more for the benefit of all policyholders, it is stated that it need not make a deposit in the State of Iowa. This expresses the policy of the State of Iowa that deposits of insurance companies for the benefit of policyholders must be for the benefit of all policyholders.

In the Iowa liquidation statutes, Sections 8660-8663 of the Insurance Laws, there is no attempt to vest in the Commissioner of Insurance the title of securities belonging to foreign corporations. The securities to which the title is vested in the Iowa Commissioner are the securities deposited in compliance with statutes, Section 8654-8655, which apply solely to domestic companies. Hence, there has been no statutory devolution upon the Iowa Commissioner of the securities belonging to the Michigan Company and deposited by it in fulfillment of its contract. The only purpose of reference to that statute is to provide a yardstick by which the deposit was to be maintained in Iowa for whatever reason the parties may have had in mind at the time for continuing a deposit in the State of Iowa. Since there is no provision of statute under which the deposit should be maintained, an attempt now to separate this deposit from other assets of the company for the purpose of liquidation and determining the treatment of a particular group of policyholders amounts to taking of property without due process of law and is a denial of full faith and credit to Michigan Statutory law, and therefore, in violation of the Constitution of the United States.

IV.

Reinsurance Treaties Created a Novation

The ordinary contract of reinsurance is one by which an insurer procures a third company to insure it against loss or liability by reason of such original insurance, and the original insured has no interest in such a contract. Usually the reinsured is not relieved from liability. But the contract of reinsurance between the Michigan Company and the Iowa Company is somewhat broader than this. It was a reinsurance contract, but it provided for the tender to the Iowa policyholders of a contract of assumption by the Michigan Company. After the reinsurance contract was effective, and while the Iowa Company was thus rendered incapable of complying with its contracts, being dissolved, it went out of existence by virtue of the Iowa laws. The Iowa statutes provide for the dissolution voluntarily and otherwise of life insurance companies, Sec-

tions 8402, 8662-8663, so the Iowa Company, after the assumption proposals were in the possession of the Iowa policyholders, became legally dead and was incapable of further activities. The reinsurance contract was authorized by Chapter 409, Sections 9104, et seq. of the Iowa Insurance Laws, which provide that, when any domestic insurance company proposed to enter into any reinsurance contract, the plan thereof must be submitted to the Insurance Commissioner, whereupon a Commission is created which passes upon the plan, and if satisfied that the interests of the policyholders are properly protected, may authorize such reinsurance and make such disposition of the assets of any such company thereafter remaining as shall be just and equitable. The statute on the contract of reinsurance seemed to imply that the reinsured company should, as was actually done here, by the insurance plan be disabled from fulfilling the outstanding policies and from carrying on the life insurance business in the future.

Hence, through novation the deposit ceased to be a statutory deposit. It became a contractual deposit, the force and validity of which must be determined by the charter power of the Michigan Company. And, after the novation, the Iowa statute that deposits by domestic corporations should vest in the State became inapplicable, and the statutes governing deposits by foreign corporations became the law governing the deposit.

Now, if we look to the action taken by the policyholders, it becomes clear that the position we have taken hereinbefore that, when the Michigan Company assumed the liabilities of the Iowa Company, as to them, a novation occurred. The policyholders in the Iowa Company could not be compelled to accept the new company. They had a right to demand the value of their policies from the old company and could have enforced that right against the deposit, had they seen fit so to do; but, once having accepted the new company, their demands against the old were gone, and the deposit made by the old company being transferred to the new company, it no longer became subject to a demand that the policyholders might make for the value of their policies. At the most, it was

property within the State of Iowa against which an execution might be levied or proper statutory proceedings taken to enforce a judgment that they might obtain against the new company.

This thought is well expressed in the case of *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683, when the Court said:

> "In adopting our Insurance act the legislature evidently intended to protect the citizens of this State, and keep them out of the clutches of worthless and irresponsible companies, and to force all companies, good and bad alike, to keep an adequate fund within the jurisdiction of our own courts for the protection of *policy-holders.*"

The right of the policyholders originating in the Iowa Company to refuse to accept the Michigan Company under the reinsurance treaties by demanding the value of their policies from the old company is well illustrated in the case of *Lovell v. St. Louis Mut. Life Ins. Co.*, 28 L. Ed. 423, 111 U. S. 264. Lovell, a citizen of Tennessee, instituted a suit against the St. Louis Mutual Life Insurance Company and the St. Louis Life Insurance Company upon a policy issued by the mutual company, all the liabilities of the mutual company being later assumed by the St. Louis Life Insurance Company. This Court held that Lovell was under no obligation to continue his insurance in the new company. He had nothing to do with that company; it was a stranger to him; and that even though the old company's assets had been assigned to the new company together with all its obligations, it could not relegate a particular policyholder to the new company; that the fund deposited by the old company in the State of Tennessee, which was maintained by the new company in that State, was properly out of which his demands could be satisfied if he did not choose to accept the new company; that, therefore, the new company was a proper party since it asserted title to the fund; that, inasmuch as the old company had totally abandoned the performance of its contract with Lovell by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, Lovell had a right to consider it as de-

termined by the act of the company and to demand what was justly due him in that exigency.

However, in the case at bar, all the policyholders of the Iowa Company accepted the new company as the one that was to carry out their contract; and, later, when the Michigan Company became insolvent and its business was reinsured by the American United Life Insurance Company, all the policyholders, except 81, accepted the American United Life Insurance Company, and those who have not, have filed their claims with the domiciliary receiver in the Michigan court. There, therefore, is no one now in a position to assert, or who is asserting, any right in the Iowa deposit aside from the respondents.

The case of *Hobbs v. Occidental Life Ins. Co.*, 87 Fed. (2d) 380, (Certiorari Denied 305 U. S. 603), is very helpful in this regard. In that case the Federal Reserve Life Insurance Company became insolvent. The receiver reinsured its business in the Occidental Life Insurance Company of California. The Occidental Life Insurance Company sent each policyholder of the Federal Reserve Life Insurance Company, a Kansas corporation, a copy of the reinsurance agreement and notice thereof, and the receiver likewise mailed each policyholder a notice of the decree and called attention to the provision that all who failed to reject the benefits of the agreement should be deemed to have accepted it and become bound by its provisions. There was a small number of rejections, and those policyholders filed claims as an election to take the cash surrender value of their policies. Their claims were paid in full. Whereupon, the Occidental Life Insurance Company filed a petition seeking an order requiring the Treasurer of the State of Kansas to surrender the notes and mortgages and other securities which were on deposit in that State. It was contended that it was necessary to retain the deposits in Kansas for the benefit of the holders of Federal Reserve policies. The decision holds that the Occidental Life Insurance Company was entitled to have the securities delivered to it. In the course of the opinion to this end, Circuit Judge Bratton, writing the opinion for the Court, said:

"The contention to which the commissioner devotes extended argument is that the reinsured policies are still in effect and will remain so until they are terminated by death, withdrawal of surrender values, or default in payment of premiums. As previously stated, the statutes in Kansas require the deposit of securities, authorize substitution and permit the withdrawal of excesses over policy liabilities. And in obedience to the mandate contained in section 20-407, these policies each bear a certificate signed by the commissioner certifying that it is secured by a pledge of bonds or notes and mortgages on real estate deposited with the treasurer in an amount equal to the full legal reserve; but it does not follow from these provisions of the statutes and certificates that the policies are now in force in the sense that the commissioner is required to retain the securities. It is well settled that upon the adjudication of insolvency and the appointment of a receiver on May 22nd, the policies of Federal Reserve were terminated as enforceable obligations for their respective face amounts, and the holders became creditors each for an amount equal to the then value of his policy with the right to participate pro rata in the assets in receivership. * * * The privilege of thus participating in such assets was the only right which the holders had from the adjudication of insolvency until the reinsurance agreement became effective.

"The effect of the reinsurance agreement was that with the assets in the hands of the receiver, holders of policies acquired new insurance protection. The new protection came from Occidental. The liability of Federal Reserve for the respective sums specified in its policies was not continued after the adjudication of insolvency and the appointment of a receiver either by decree of the court or the reinsurance agreement. The policies were in effect after the reinsurance contract became operative for the sole purpose of determining, in conjunction with the contract, the liability of Occidental, not continuing liability of Federal Reserve for which the securities were confessedly deposited. There was a novation in which Oc-

> cidental was substituted for Federal Reserve in point of liability with certain changes which were made with the consent of the policyholders. * * * The right of such holders to participate pro rata in the assets in receivership could not be taken from them without their consent. * * * But no effort was made to do that. Instead, the court expressly preserved to each of them the right to file a claim and thus receive his aliquot interest in such assets; and the transfer to Occidental was subject to that right."

This case was re-affirmed by the later case of *State of Kansas v. Occidental Life Ins. Co.*, 95 Fed. (2d) 935. (Certiorari Denied 305 U. S. 603).

So, in the case at bar, it is immaterial that the policies originally issued to the great majority of the Iowa group had stamped upon them a representation that there was a deposit of securities in the State of Iowa to protect the reserves of the policy. After the reinsurance with the American Life Insurance Company of Detroit, the policies no longer were in force in the sense that Iowa was bound to retain and require that the deposit be maintained in the State of Iowa. Had any policyholder at that time dissented, he would have had, of course, the right to have had his claim satisfied out of the deposit, but having accepted the new company, that right was lost. In other words, there was a novation in which the American Life Insurance Company of Detroit was substituted for the American Life Insurance Company of Des Moines, and the policyholder in the old company would be compelled to look to the American Life Insurance Company of Detroit for satisfaction of any liability that arose out of the contract issued by the old company.

In view of the action of the policyholders of the Iowa Company, the language of the Court in the case of *Illinois Life Ins. Co. vs. Tully*, 174 Fed. 355, is very apt, and to paraphrase it, "The petitioner Fischer has simply assumed that he was a trustee for and stood in such privity with the policyholders originating in the Iowa Company as to be entitled to pursue any action which they might have taken had they been parties to it, but his as-

sumption is mistaken, so he becomes nothing but a mere volunteer or bailee assuming to act without authority of law or contract, and in no position to invoke for his justification in this case any of the rights of the policyholders."

CONCLUSION

It should be clear that the Circuit Court of Appeals was entirely right when it found that the Federal Courts in Iowa had no jurisdiction over the subject matter of this cause for the reason that jurisdiction rested solely and exclusively in the Michigan Court in which the insolvency proceedings were instituted. It is equally clear that there is not involved here a claim by a citizen of the State of Iowa against assets located in that state. Rather the petioner is a volunteer attempting to assert rights for citizens of many states, other than Iowa. He would now, without their consent, revoke their election of 1921 to accept the Michigan Company and in 1939 their acceptance of the American United. He would act as a guardian of this group of policyholders from various states and countries and attempt to undo all the positive actions they have taken in administering their own insurance protection. This is not a case of a creditor entitled to have the protection of the assets in the state of his residence for the payment of his claim against a foreign corporation under liquidation in the state of its domicile. Rather the situation is one where policyholders in a life insurance company, who are a peculiarly distinct class of creditors as we have pointed out, have voluntarily accepted the charter of a life insurance company of a foreign state which embodies in it the statutory provisions relating to life insurance companies of that state, including the administering of its assets in insolvency proceedings. To the majority of them the petitioner is more foreign than respondent Emery.

Upon all equitable principles that have been recognized at all times in this Court, the decree of the Circuit Court of Appeals should be affirmed and the administration of

the assets in suit conferred solely and exclusively in this respondent.

Repectfully submitted,

CLAYTON F. JENNINGS,
EDMUND C. SHIELDS,
Attorneys for Respondent John G. Emery, Commissioner of Insurance of the State of Michigan, and Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan.